

Diversity shares many goals. Outside the courtroom, it better equips our institutions to understand more of the viewpoints and backgrounds that comprise our pluralistic society. Moreover, a growing body of social research suggests that groups with diverse experience and backgrounds come to the right outcome more often than do non-diverse groups which may be just as talented. I believe a diverse court will function better as well.

Another concern I have about the current Supreme Court is its handling of business cases. Too often it seems they disregard settled law and congressional policy choices. Based on my education, my experience and my inclination, I am not anti-business, but whether it is preempting State consumer protection laws, striking down punitive damage awards, restricting access to the courts, or overturning 96 years of pro-consumer antitrust law, today's court gives me the impression that in business cases the working majority is outcome-oriented and therefore too one-sided.

Given our current economic crisis and the failures of regulation and enforcement that led to that crisis, that bias is particularly troubling. Congress can, and will, enact a dramatically improved regulatory system. The President can, and will, make sure that relevant enforcement agencies are populated with smart, motivated, and effective agents.

But a Supreme Court, resistant to Federal Government involvement in the regulation of markets, could undermine those efforts. A judge or a court has to call the game the same way for all sides. Fundamental fairness requires that, in the courtroom, everyone comes to the plate with the same count of no balls and no strikes.

One of the aspirations of the American judicial system is that it is a place where the powerless have a chance for justice on a level playing field with the powerful. We need Justices on the Supreme Court who not only understand that aspiration, but also are committed to making it a reality.

Because of the importance of businesses cases before the Supreme Court, I plan to spend some time asking you about your experience as a commercial litigator, your handling of business cases as a trial judge and on the Court of Appeals, and your approach to business cases generally. From what I've seen of your record, you seem to recall these cases right down the middle without any bias or agenda. That is very important to me.

Very soon, those of us up here will be done talking and you will have the chance to testify and answer our questions. I look forward to your testimony. Thank you.

Chairman LEAHY. Thank you. Thank you very much, Mr. Kaufman.

Another former Chairman of this Committee, Senator Specter. I yield to you.

**STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM
THE STATE OF PENNSYLVANIA**

Senator SPECTER. Thank you, Mr. Chairman.

I join my colleagues, Judge Sotomayor, in welcoming you and your family here. I compliment the President for nominating an Hispanic woman. I think it was wrong for America to wait until 1967 to have an African-American, Justice Thurgood Marshall, on

the court, waited too long, until 1981, to have the first woman, Justice Sandra Day O'Connor. I think, as a diverse Nation, diversity is very, very important.

You bring excellent credentials academically, professionally, your service on the court. The Constitution requires the process for this Committee, and then the full Senate, to consider in detail your qualifications under our consent function. Most of the questions which will be asked of you in the course of these hearings will involve decided cases. I intend to ask about decided cases, but also about cases that the Supreme Court decided not to decide and on the rejection of cases for decision. It's a big problem.

The court, I would suggest, has time for more cases. Chief Justice Roberts noted in his confirmation hearing that the decision in more cases would be very helpful. If you contrast the docket of the Supreme Court in 1886 with currently, in 1886 there were 1,396 on the docket, 451 were decided. A century later, there were only 161 signed opinions; in 2007, there were only 67 signed opinions.

I start on the cases which are not decided, although I could start in many, many areas. I could start with the Circuit splits, where one Court of Appeals in one section of the country goes one way, another Court of Appeals goes the other way. The rest of the courts don't know which way the precedents are, and the Supreme Court decides not to decide.

But take the case of the Terrorist Surveillance Program, which was President Bush's secret warrantless wire taps, and contrast it with congressional authority exercised under Article I on the Foreign Intelligence Surveillance Act, providing the exclusive way to have wire taps, perhaps the sharpest conflict in the history of this great country on the Article I powers of Congress and the Article II powers of the President as Commander-in-Chief.

The Federal District Court in Detroit said that the Terrorist Surveillance Program was unconstitutional. The Sixth Circuit decided 2:1 that the plaintiffs did not have standing. I thought the dissenting opinion was much stronger than the majority opinion. Standing, as we all know, is a very flexible doctrine, and candidly, at least as I see it, used frequently by the court to avoid deciding a case.

Then the Supreme Court of the United States denied certiorari and decided not to hear the case, didn't even decide whether the lack of standing was a justifiable basis. This has led to great confusion in the law. And it's as current as this morning's newspapers reporting about other secret programs which apparently the President had in operation. Had the Supreme Court of the United States taken up the Terrorist Surveillance Program, the court could have ruled on whether it was appropriate for the President not to notify the Chairman of the Judiciary Committee about the program.

We have a law which says all members of the Intelligence Committees are to be notified. Well, the President didn't follow that law. Did he have the right to do so under Article II powers? Well, we don't know. Or within the last two weeks, the Supreme Court denied hearing a case involving claims by families of victims of 9/11 against Saudi Arabia and Saudi Arabia commissions, and for princes in Saudi Arabia.

The Congress decided what sovereign immunity was in legislation in 1976 and had exclusions for torts, but the Supreme Court denied an opportunity for those families who had suffered grievously from having their day in court. One of the questions, when my opportunity arises, will be to ask you what would be the standards that you would employ in deciding what cases the Supreme Court would hear.

There is currently a major matter at issue on the Voting Rights Act, and the conflict has been present for many years, between the authority of Congress to decide what is the factual basis for legislation, a standard which Justice Harlan decided in the *Wirtz* case was a rational basis. The Supreme Court, more recently, has adopted a standard of congruently—congruence and proportionality, a standard which Justice Scalia has said is a “flabby test” which invites judicial lawmaking.

You’ll hear a lot about—in this hearing about a judge’s responsibility to interpret the law and the statutes and not to make laws. And during the confirmation hearing of Chief Justice Roberts, he said in pretty plain terms that the court ought to allow the Congress to decide what the factual basis is, and for the court to do otherwise is to engage in judicial legislation.

The Voting Rights case was decided on narrow grounds, but it certainly looks, if you read the record, that the court is about ready to upset the Voting Rights case just like it did in *Alabama v. Garrett* on the Americans With Disabilities Act, notwithstanding a vast record establishing the basis.

So I would like to know what your standard will be, if confirmed, a rational basis which had been the traditional standard, or congruence and proportionality? If you tell me congruence and proportionality, then I’ll ask you what it means because it slips and slides around so much that it’s impossible to tell what a constitutional standard is. We Senators would like to know what the standards are so we know what to do when we undertake legislation.

Your decision on the District—on the Circuit Court, in a case captioned *Entergy Corporation v. Riverkeeper, Inc.* involving the Environmental Protection Agency and the Clean Water Act, has a special prominence now that we are debating climate control and global warming. In the Second Circuit opinion, you were in the majority, deciding that it was the “best technology”.

The Supreme Court reversed, 5:4, saying that it turned on a “cost-benefit analysis”. It, I think, is worthy of exploration, although what you answer, obviously, is a matter of your discretion as to whether, on a 5:4 decision—it’s hard to say who’s really right, the 5 or the 4, as a matter of interpreting the Constitution or the statute.

Having a different view, I’d be interested to know if you’d care to respond, when the time comes, as to whether you’d be with what had been the minority, and perhaps a voice as strong as yours in the conference room would produce a different result. It could have a real impact on what we’re legislating now on cap and trade.

With the few seconds I have left, I’d like to preview some questions on televising the court. I don’t know why there’s so much interest here today. I haven’t counted this many cameras since Justice Alito was sitting where you’re sitting. You’ve had experience in

the District Court with television. You're replacing Justice Souter, who said that if TV cameras were to come to court they'd have to roll over his dead body. If you're confirmed, they won't have to roll over his dead body.

[Laughter].

Senator SPECTER. But the court decides all the cutting-edge questions of the day. The Senate is televised, the House is televised. A lot of people are fascinated by this hearing. I'd like to see the court televised; you can guess that.

Thank you very much, Judge Sotomayor.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Specter.

I understand, the next statement will be by Senator Franken, and then we'll call forward the two people who are going to introduce you, and you, then, Judge, have a chance to say something.

Senator Franken has been waiting patiently all day, and I appreciate having you here. Please go ahead.

**STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR FROM
THE STATE OF MINNESOTA**

Senator FRANKEN. Thank you, Mr. Chairman. It's an incredible honor to be here, less than week into my term as a United States Senator. My first major responsibility is here at this historic confirmation hearing.

I am truly humbled to join the Judiciary Committee, which has played, and will continue to play, such an important role in overseeing our Nation's system of justice. Chairman Leahy, for several years now, I have admired your strength and integrity in leading this Committee. I am grateful for your warm welcome and the consideration that you've given me, sir, and I am honored to serve alongside of you.

Ranking Member Sessions, I want you to know that I plan to follow the example of my good friend and predecessor, Paul Wellstone, who was willing and ready to partner with his colleagues across the aisle to do the work of the American people. I look forward to working over the years with you and my other Republican colleagues in the Senate to improve the lives of all Americans.

To all the members of this Committee, I know that I have a lot to learn from each of you. Like so many private citizens, I have watched at least part of each and every Supreme Court confirmation hearing since they've been televised. And I would note that this is the first confirmation hearing that Senator Kennedy has not attended since 1965.

[Interruption from the audience.]

Chairman LEAHY. The Senate will suspend. Officers, please remove whoever is causing the disturbance.

Again, as Senator Sessions and I have said, this is a meeting of the United States Senate. We'll show respect to everybody who is here.

[Interruption from the audience.]

Chairman LEAHY. We'll show respect to everybody here, and certainly to Judge Sotomayor, to the Senators on both sides of the aisle, and we will have order in this room.